TCEQ DOCKET NO. 2009-0913-MWD
SOAH DOCKET NO. 582-10-0353

APPLICATION OF THE CITY OF	§	BEFORE THE STATE OFFICE
	§	
PATTON VILLAGE FOR TPDES	§	OF
	§	
PERMIT NO. WQ0014926-001	§	ADMINISTRATIVE HEARINGS

CITY OF PATTON VILLAGE'S
REPLY TO EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS AND ADMINISTRATIVE LAW JUDGE:

COMES NOW, the City of Patton Village ("City," "Patton Village," or "Applicant") and files this reply to the Office of the Public Interest Counsel's ("OPIC") and Protestant Adriana Casenave's ("Protestant") Exceptions to the Administrative Law Judge's ("ALJ") Proposal for Decision ("PFD").

I. Introduction

Patton Village applied with the Texas Commission on Environmental Quality ("TCEQ" or "Commission") to obtain a wastewater discharge permit in order to bring centralized sewer service to the citizens of this low-income, rural community, who have historically relied on septic systems for treatment and disposal of wastewater. The thirty-plus year-old septic systems in the City are failing or operate poorly because the soils are unsuitable for these types of septic systems, most of the systems are on lots that are too small to accommodate septic systems, and the septic systems are aging. To address this public health threat, upon the recommendation of the Harris-Galveston Area Council of Governments, the United States Department of Agriculture – Rural Development awarded Patton Village $2.289 million in grant money and $1.811 million

in low-interest loan money for the construction of sewage collection lines and a treatment facility to serve initially over 400 customers.[1]

Upon receipt of hearing requests from the Protestant and Tamara Garza (who subsequently withdrew as a party) regarding the City's wastewater discharge permit application, the Commission referred the City's application and draft permit to the State Office of Administrative Hearings ("SOAH") for a contested case hearing on three issues:

1. Whether the proposed discharge impacts Peach Creek's ability to meet TCEQ water quality standards;

2. Whether the proposed discharge would contribute to excess bacteria in Peach Creek and Lake Houston; and

3. Whether the proposed discharge impacts the Protestants' use of Peach Creek for recreational purposes.

The evidence in this case shows, and the ALJ correctly concludes, that: (1) the proposed discharge will not adversely impact Peach Creek's ability to meet the water quality standards, and decommissioning over 400 unmonitored, failing or poorly operating septic systems may help improve the water quality of Peach Creek; (2) the proposed discharge will not contribute excess bacteria to Peach Creek; and (3) the proposed discharge will not impact the Protestants' use of Peach Creek for recreational purposes.

In opposing the City's application and draft permit, OPIC and the Protestant almost exclusively rely on alleged inadequacies of the testimony of the City's expert witness, George Lazaro, P.E., and wholly ignore all other evidence introduced in this case, as well as the legal standards applicable to wastewater discharge applications and permits, to argue that Patton Village's draft permit and application should be denied. OPIC also advocates that once a permit

[1] *See* Patton Village's Closing Arguments, Replies to Closing Arguments, Patton Village Ex. No. 1,,2, 3, 4 and 6, and TR – 24:11 to 25:7, 67:2 to 68:16.

is protested, it is the applicant's burden of proof to disprove claims made by the protestants, rather than to prove the draft permit and application comply with TCEQ regulations, which is the proper standard of proof. As demonstrated by the Applicant, when all of the evidence is evaluated and the TCEQ rules are examined and applied to this case, Patton Village has met its burden of proof on all of the referred issues. For this reason, the Exceptions to the ALJ's PFD should be denied and Patton Village's draft permit should be issued.

II. Patton Village has met its burden of proof

While the Protestant's and OPIC's Exceptions to the PFD and Order properly ascribe the burden of proof on all referred issues to the Applicant,[2] their arguments (1) suggest that an applicant's burden of proof shifts by what issues a protestant chooses to raise and requires something "more" than showing that the draft permit and the application meet the TCEQ rules, (2) urge the ALJ and the Commission to essentially disregard all evidence in the case but selected portions of the testimony of one of the City's expert witnesses, and (3) ignore the proper role of the ALJ in considering the weight of all evidence in the record in determining whether that burden of proof has been met.

An applicant's burden of proof is, by preponderance of the evidence, to show that its application and draft permit meet the TCEQ rules for that type of application. Simply because an issue is referred to SOAH does not mean that the applicant's burden changes or what is required of the applicant under the Commission's rules changes. For example, for toxic materials, OPIC suggests more analysis is required because the Protestant raised the issue, apparently arguing that what is required (or not required) by the TCEQ rules should be set aside and disregarded. This cannot be the case. Moreover, the applicant is not required to prove the

[2] The Applicant has the burden of proof by a preponderance of the evidence. 30 TEX. ADMIN. CODE § 80.17(a).

TCEQ's rules, policies, and guidance documents relating to domestic wastewater treatment plants are protective.[3] In other words, if the Commission sets a standard, such as it has for bacteria, the applicant is required to show that its permit meets that standard, not to prove that standard will be protective. An applicant must have some certainty that even if its application and draft permit is protested, its burden of proof remains the same.

OPIC and the Protestants urge the ALJ and Commission to disregard all evidence but selected portions of the testimony of the City's expert witness, Mr. Lazaro, and repeatedly claim there is "no evidence" to support the conclusions reached by the ALJ. This assertion is simply incorrect. While the Applicant disagrees with OPIC's and the Protestant's characterization of Mr. Lazaro's qualifications as an expert,[4] even if the ALJ were to disregard the City's expert testimony of Mr. Lazaro, the ALJ may consider and weigh all other evidence – including fact testimony of all of the City's witnesses, the City's application, the draft permit, the Executive Director's memorandums concerning the application, and testimony of the Executive Director witnesses – introduced during the contested case in reaching her determination that the City met its burden of proof.

Moreover, the Applicant is not prohibited from introducing information developed by the Executive Director as part of his review of the permit application, or using direct and cross-examination testimony of the Executive Director's witnesses. Nor is the ALJ required to weigh

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[3] These rules include, but are not limited to, 30 TEX. ADMIN. CODE Chs. 217, 305, and 309, the Lake Houston watershed rules, the Texas Surface Water Quality Standards ("water quality standards"), the *Procedures to Implement the Texas Surface Water Quality Standards* (RG-194) (January 2003), and other referenced guidance and policy documents. These rules and guidance documents have undergone extensive review and development through the stakeholder and the rulemaking process, and have been reviewed and approved by the Environmental Protection Agency ("EPA"). *See for example* 25 Tex. Reg. 7722 (August 17, 2000); and *Implementation Procedures* at p. 1.

[4] Mr. Lazaro is a licensed professional engineer with many years of experience permitting and designing similar facilities to that of Patton Village. He prepared the application for Patton Village, visited Patton Village and the discharge site, and is familiar with the type of facility and the types of customers that will be connected to the plant. *See* Patton Village Ex. Nos. 4 and 5.

this evidence differently. In fact, TCEQ rules require the Executive Director to present certain evidence. Section 80.118 of Title 30 of the Texas Administrative Code requires the record in a contested case hearing to include the final draft permit, the Executive Director's decision (or preliminary decision) on the draft permit, the summary of the technical review of the application, and any agency document determined by the Executive Director to be necessary to reflect the administrative and technical review of the application. Notably, while the Executive Director is not allowed to assist a permit applicant in meeting its burden of proof,[5] TCEQ rules exempt the evidence that the Executive Director must provide in a contested case hearing from this requirement. Section 80.127(h) of the TCEQ rules states that testimony or evidence given in a contested case permit hearing by agency staff (regardless of which party called the staff witness or introduced the evidence) or any analysis, study, or review that the Executive Director is required by statute or rule to perform does not constitute assistance to the permit applicant in meeting its burden of proof. These documents and the testimony of the Executive Director's witnesses are evidence an applicant may use to meet its burden of proof.

Finally, OPIC and the Protestant ignore the role of the ALJ in weighing the evidence. An ALJ must make his or her judgment "on the weight of the evidence on questions committed to agency discretion." *Texas Dept. of Public Safety v. Varme*, 262 S.W.3d 34, 38 (Tex. App.—Houston [1st Dist.] 2008, no pet.). The ALJ is the sole judge of the weight of the evidence in the record; any conflict in evidence is a matter for the judge. *Tex. Dep't of Pub. Safety v. Raffaelli*, 905 S.W.2d 773, 778 (Tex. App.—Texarkana 1995, no writ).

The Protestant and OPIC demand that the ALJ weigh the evidence according to their own urgings so as to reach their preferred conclusion. *Cf. Fleetwood Community Home v. Bost,* 110 S.W.3d 635, 643 (Tex. App.—Austin 2003, no pet.) (noting that weighing contrasting evidence

[5] TEX. WATER CODE § 5.228(e).

in the record goes to the ALJ's fact-finding role, and that "the ALJ need not have weighed the evidence according to Fleetwood's urging"). However, the role of the ALJ is to consider the evidence in the record, assign to it the weight that the judge finds appropriate, and reach his or her conclusion based on this examination of the evidence as applied to the TCEQ's rules. In this instance, the ALJ was free to consider the fact and opinion testimony of the Applicant's witnesses, the Staff's testimony and findings, including memorandums regarding the permit, the application, and the terms of the permit itself in reaching her conclusion. That the Protestant and OPIC would prefer the ALJ to have weighed all evidence in light of their preferred outcome is irrelevant to the legal role required of the ALJ.

III. Patton Village's application and draft permit meet the regulatory requirements

A. Toxicity Analysis

OPIC argues that no witnesses of the Applicant or Executive Director presented information on toxic pollutants and that there is no analysis by the Applicant on the potential toxicity of the proposed discharge. This assessment of the evidence is incorrect. While the analysis may not be what OPIC wants (because OPIC contends something "more" is required if a protestant raises it as an issue), the analysis regarding this issue was completed in accordance with the TCEQ rules and guidance documents. The ALJ correctly concludes that no additional toxicity analysis is required because Patton Village's application, proposed permit, and proposed discharge meet the requirements of TCEQ rules, including the water quality standards and its *Implementation Procedures*, regarding toxicity.

Under the TCEQ rules (which accord with the EPA requirements), the TCEQ conducts an assessment as to which facilities are likely to have toxic materials enter the treatment plant, thus having the potential to cause the treated effluent to be chronically or acutely toxic. TCEQ (and

EPA) have determined that the following facilities must include with the permit application effluent data for certain materials and compounds for which there are standards: (1) domestic facilities requesting a permitted average flow equal to or greater than one million gallons per day ("MGD"); (2) domestic facilities with an approved pretreatment program; (3) domestic facilities requesting a permitted average flow of less than one MGD on a case-by-case basis when the facility inspection or other information provides reasonable potential to expect the presence of toxic pollutants in the receiving water or effluent; and (4) industrial facilities. *See* 30 TEX. ADMIN. CODE § 307.3(a)(53); *Implementation Procedures* at pg. 52; 40 CFR § 122.21(j). Thus, the TCEQ rules establish a presumption that facilities not included in the above-described list are unlikely to discharge wastewater that is acutely or chronically toxic and, for this reason, no specific analysis under the TCEQ rules is required.[6]

The evidence demonstrates that the City's proposed facility does not fit the threshold standards that would require it to submit effluent data for toxic materials, or require the Executive Director to include specific numerical criteria in the permit, because the proposed domestic facility will not serve any industrial users, is not required to have an approved pretreatment program, and will only discharge up to 350,000 gallons of wastewater per day.[7] More importantly, there is no credible information suggesting there is a reasonable potential to expect the presence of toxic materials in either the receiving stream or effluent.[8] By

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[6] It should also be noted that the water quality standards establish numerical criteria for toxic materials and those criteria apply regardless of whether they are in the permit. 30 TEX. ADMIN. CODE § 307.6(b); *Implement Procedures* at p. 52. If a facility has a significant potential for exerting toxicity in the receiving water, instead of denying the permit, the Executive Director will specifically insert effluent limitations in the proposed permit and the facility will be required to conduct whole effluent toxicity biomonitoring. (TR – 270:12 to 270:14). 30 TEX. ADMIN. CODE § 307.6(e)(2).

[7] *See* Patton Village's Exhibit Nos. 6 and 7, Executive Director's Exhibit No. 3, and TR – 66:20 to 67:1, 116:1 to 116:10, 159:12 to 161:1; 163:7 to 163:14, 180:19 to 182:22, 190:10 to 190:24, and 195:19 to 196:7.

[8] *Id.*

demonstrating that it is not one the types of facilities that are required to submit additional information on toxic materials or to conduct whole effluent toxicity biomonitoring, the ALJ correctly finds the Applicant has met its burden of proof on this issue. Furthermore, simply because the Protestant raised toxicity as an issue does not mean that the rules regarding toxicity reviews, which apply to every other wastewater discharge permit applicant, no longer apply to Patton Village.

The Protestant also contends that she has demonstrated that nonylphenol and other emerging contaminants could be present in Patton Village's wastewater discharge and, because these pollutants were not specifically analyzed, Patton Village's draft permit should be denied.[9] To start, there is no evidence demonstrating that Patton Village's proposed discharge will contain toxic substances, much less at levels that would be acutely or chronically toxic. There is also no evidence demonstrating that Patton Village's discharge is more likely to discharge the offending substances than other similar facilities in terms of the type of discharge (domestic) and the amount of the discharge (less than 1.0 MGD). Furthermore, with respect to other emerging contaminants, such as estrogen, there are no water quality standards and none are proposed by the TCEQ. As the ALJ concludes, the general prohibition against water being toxic does not require the establishment of permit-specific limits (or denial of the permit as the Protestant advocates) for a constituent that has no specific standard, and the application of that *ad hoc* standard to a facility that does not meet the threshold requirements for a toxicity review. The proper way to develop standards for these constituents is not through the permitting process, but

[9] As explained, Patton Village's proposed facility would not be a candidate for a specific nonylphenol limit because the proposed facility and discharge are below the threshold levels TCEQ uses to determine which facilities require a toxicity review. Nevertheless, there is no evidence that nonylphenol is or will be in Patton Village's discharge or that it will be present at toxic levels. *See* TR – 116:1 to 116:10).

through the rulemaking process, after the science has been fully vetted and the EPA, the public, and other permittees have had a chance to weigh in on the proposed rules.

B. Bacterial Requirement

The ALJ correctly concludes, based on the evidence in the record and the TCEQ rules, that the draft permit complies with the TCEQ rules regarding bacteria, and thus will not contribute excess bacteria to Peach Creek or Lake Houston, or impair the recreational use of Peach Creek. Section 309.3(h) of the TCEQ rules, relating to setting effluent limits for bacteria, requires a permittee to measure *Escherichia coli* (*E. coli*) as a means to assess whether the effluent to be discharged has been adequately disinfected. Section 309.3(h) further requires that the monthly average bacteria limitation in a wastewater discharge permit *be the applicable geometric mean for the most stringent contact recreation category as specified in water quality standards* and that the daily maximum bacteria effluent limitation in a wastewater discharge permit *be the applicable single grab sample for the most stringent contact recreation category in the water quality standards*, thus requiring a permittee to meet the water quality standards for bacteria at the "end-of-the pipe" without the benefit of any instream dilution.. *See 30* TEX. ADMIN. CODE § 309.3(h); 34 TEX. REG. 8330. In its adoption preamble for the rules, TCEQ further explained that:

> The commission is adopting the contact recreation criterion in the Texas Surface Water Quality Standards *as the bacteria limit* for domestic TPDES permits. The Texas Surface Water Quality Standards program has determined that the contact recreation criterion is protective of human health and the environment. It is also readily achievable with current technology.

See 34 TEX. REG. 8328 [Emphasis added].

TCEQ's water quality standards for both Lake Houston and Peach Creek require that the geometric mean of *E. Coli* should not exceed 126 colony forming units per 100 ml of water, and

single grab samples of *E. Coli* should not exceed 394 per 100 ml of water. 30 TEX. ADMIN. CODE §§ 307.7(b)(1)(A) and 307.10(1) (Appendix A – San Jacinto River Basin Segment 1011). Under the requirements of section 309.3(h), the effluent limits in a draft permit whose discharge will be to those segments must be the criterion in the water quality standards.

Despite the clear requirements in the Commission's rules, OPIC and the Protestant argue that the Applicant has not met its burden of proof because measuring *E. coli* may not be sufficient, and the TCEQ's water quality standards for bacteria may not be protective because "the level of bacteria appropriate for a waterway as a whole . . . is not necessarily indicative of the appropriate bacteria level for a specific discharge into the waterway."[10] However, it is not the Applicant's burden to disprove the claims of the Protestants that the TCEQ's rules are not protective. Rather, it is the Applicant's burden to prove that its application and draft permit meet the requirements of the rules.

As required by the TCEQ rules, the Applicant's draft permit requires it to measure *E. coli* to assess the adequacy of the disinfection of the effluent, not other pathogens as advocated by the Protestants. Also, as required by the TCEQ rules, the effluent limitations in the Applicant's draft permit for *E. coli* are the same as the water quality standards for both Lake Houston and Peach Creek, and thus by rule will not contribute excess bacteria to Peach Creek or Lake Houston. *See* 30 TEX. ADMIN. CODE § 309.3(h). To find otherwise is to require the Applicant to meet a new and different (and unknown) standard with which only Patton Village would be required to comply.

Both Protestants and OPIC also raise the issue that there is no specific analysis on whether the proposed discharge will contribute excess bacteria to Lake Houston, because the analyses are limited to Peach Creek. As previously discussed, the bacteria limits for both Peach

[10] *See* OPIC's Exceptions to the PFD at p.8.

Creek and Lake Houston are the same. While the Applicant disagrees with OPIC's and the Protestant's assessment of the evidence regarding this issue, it stands to reason that if the Applicant's proposed discharge will not contribute to excess bacteria in Peach Creek, it will not contribute to excess bacteria in Lake Houston, because (1) the effluent limits are the same for each water body, and (2) the methods to be employed by the Applicant to control bacteria – *i.e.* disinfection and monitoring (which are required by TCEQ rules) – would be the same regardless.[11] There is no evidence supporting the suggestion that the TCEQ should, on an *ad hoc* basis, impose a different set of bacteria limits, monitoring requirements, and disinfection requirements on Patton Village than what is required by the water quality standards and the Lake

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[11] The TCEQ rules require daily monitoring of effluent to demonstrate compliance. *See* 30 TEX. ADMIN. CODE § 309.3(h). Additionally, the Lake Houston watershed rules require the domestic wastewater treatment facilities that use gaseous chlorination disinfection systems to install dual-feed chlorination systems which are capable of automatically changing from one cylinder to another, and that these systems operate so that the minimum chlorine residual of 1.0 mg/l and the maximum chlorine residual of 4.0 mg/l measured on an instantaneous grab sample is not exceeded. *See* 30 TEX. ADMIN. CODE § 311.36. Regarding this standard, the Protestants' witness, Mary Ellen Whitworth, testified as follows:

Q: [By Emily Rogers] And in the draft permit, what method of disinfection is proposed?

A: Chlorine.

Q: And what's the purpose of the detention time?

A: Well, the theory is that if you expose the treated wastewater to chlorine for a minimum of 20 minutes, then the pathogens would be killed.

Q: And why does the draft permit require the effluent to contain a chlorine residual?

A: Because you want to maintain – I mean, they do not want any regrowth as it goes through the pipe and out to the – out to the receiving stream.

Q: And what is the chlorine residual proposed in the draft permit?

A: One milligram per liter and shall not exceed (sic) 4 milligrams per liter after a retention time of 20 minutes based on peak flow.

Q: And is it your opinion that that chlorine residual level should be higher than 1 milligram per liter?

A: No.

Q: Is it your opinion that it should ever exceed 4 milligrams per liter?

A: No. It should not exceed 4 milligrams per liter.

(TR – 105:3 to 106:2).

Houston watershed rules for both Lake Houston and Peach Creek, and of all other applicants and permittees on the segment.

The ALJ also correctly reasons that, because the proposed discharge meets the water quality standards for Peach Creek, the contact recreational use of Peach Creek will be maintained and, thus, the Protestants' use of Peach Creek will not be adversely affected. 30 TEX. ADMIN. CODE § 307.7(b). The Applicant's burden of proof does not, as OPIC and the Protestant claim, vary depending on the type of recreation or who recreates in the creek.

IV. The City needs centralized sewer service to address septic systems that are poorly operating or failing in Patton Village, and that pose a public health threat in the community.

OPIC and the Protestant suggest there is no evidence that Patton Village's septic systems in the area are poorly operating or failing. However, the evidence in the record is clear and uncontroverted. The City has been working for over ten years to bring centralized sewer service to Patton Village and to take approximately 400 homes in Patton Village off of septic systems. As the evidence shows, the existing septic systems are located on lots whose sizes do not meet the Montgomery County on-site sewer system regulations (or even the TCEQ's less stringent regulations), and range in age from 30 to 40 years old.[12] Even the Harris-Galveston Area Council of Government ("HGAC") recognized the need for a centralized sewer system in the area because of the poorly operating septic systems. In its project overview, the HGAC staff noted that "[t]his project will relieve poorly operating on-site septic systems."[13] The HGAC staff went on to recommend that Patton Village receive a grant and a low interest loan to cover the project costs, stating that "[t]he project will improve water quality by eliminating poorly

[12] *See* Patton Village's Closing Arguments, Replies to Closing Arguments, and Patton Village Ex. No. 1,,2, 3, 4, and 6, TR – 24:11 to 25:7, 67:2 to 68:16.

[13] *See* Patton Village Ex. 3.

operating septic systems."[14] Because of the conditions of the septic systems, in other parts of the state, this area would be characterized as a *colonia*. With this information, the ALJ correctly concludes that removing these failing or poorly operating systems will likely improve the water quality of Peach Creek. Without a doubt, removing these systems will eliminate a public health threat and improve the quality of life of the citizens of Patton Village.

V. Conclusion

Patton Village respectfully requests that the ALJ deny OPIC's and the Protestant's Exceptions to the PFD, and that the Commission grant the City's Application and draft permit.

Respectfully submitted,

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[14] *See* Patton Village Ex. 3. The United States Department of Agriculture – Rural Development ("USDA"), accepting HGAC's recommendations, awarded Patton Village $4.1 million, with 55% of the money in the form of a grant, and 45% of the money in the form of a low interest loan. *See* Patton Village Ex. 2.

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that on this 20th day of January, 2011, a true and complete copy of the foregoing was sent to the following by facsimile, overnight delivery, or by first class mail:

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